No. 76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners,*

v.

WILSON P. LOCKRIDGE, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Idaho

REPLY BRIEF FOR PETITIONERS

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The single issue in this case is whether a State Court may assert jurisdiction over a claim made under *State* law which embraces union conduct that is either prohibited or protected under the Labor Management Relations Act, 29 U.S.C. §§ 151 *et seq.* ("Act"). That is the only question which was presented to the Courts

below; and that is the only one considered or decided by them. That is the only question presented in the petition for certiorari; and that is the only one discussed in the brief in opposition. To that question, Petitioners urge that the answer is clear: There is no such State Court jurisdiction, particularly under the teachings of this Court in the *Borden* and *Perko* cases. Now Respondent Lockridge evidently agrees. For in his Brief on the merits ("Resp. Br.") Lockridge strives to inject into the case additional questions as to *Federal* law grounds of jurisdiction under Section 301 of the Act, 29 U.S.C. § 185, breach of the collective bargaining contract and breach of the Union's duty of fair representation. We shall demonstrate that there are no such questions properly before this Court and that in any event Lockridge's position is utterly without merit. First, however, we shall discuss the question which is indeed presented in this case.

I.

THE STATE COURTS HAD NO JURISDICTION OVER LOCKRIDGE'S CLAIM BECAUSE IT INVOLVED UNION CONDUCT PLAINLY REGULATED BY THE ACT

Lockridge does not attempt any genuine reply to our principal Brief ("Pet. Br."). He assays no reply whatever, for example, to the demonstration that Congress has occupied the field and closed it to State Court jurisdiction (Pet. Br. 58-63), which independently and apart from the "arguably" touchstone requires reversal of the judgment below. Nor does he make any reply to basic elements of our exposition of the law on the "arguably" touchstone, for example, the demonstration that this identical kind of claim is routinely and exclusively handled by the NLRB (Pet. Br. 52-55)—a fundamental element in

the case confirmed and elucidated by the Board's Brief as *Amicus Curiae* herein. And Lockridge almost completely disregards the balance of our principal Brief, for example, the analysis of the Act and the discussion of *Borden, Perko* and *Day*. For the most part, Lockridge merely repeats the conclusory assertions of the Court below without any regard to the response to that decision in our Brief (Pet. Br. 46-52). Indeed, Respondent's entire Brief reads as though he had glanced at Petitioners' only to excise some portions out of context to be fitted into the precast contours of his own.[1] Accordingly, Respondent's Brief con-

[1] In many respects, Lockridge grossly misstates our position. For example, we do not "postulate that there are only two types of activities, those protected and those prohibited, and if an act is not prohibited by Section 8, it must, *a fortiorari*, be protected" (Resp. Br. 10-11). Our position is hardly so generalized or comprehensive. We contend only that the particular Union activity involved in this case—causing the discharge of an employee by notifying the employer under the union-security agreement that the employee has not timely tendered the periodic dues uniformly required as a condition of employment—is certainly either protected or prohibited, by virtue of the comprehensive regulation which Congress accorded this particular activity. Without addressing himself to the statutory language discussed by us which expressly demonstrates this, Lockridge appears to deny both that this activity is prohibited and that it may be protected. On the one hand, he asserts "Congress had disclaimed the assumption of exclusive federal control and has really done nothing more than proclaim that the federal policy is not hostile to union security clauses" (Resp. Br. 14). This is plainly nonsense, in the light of the express statutory provisions, particularly § 8(b)(2) of the Act, which are directly applicable. Manifestly, the Federal policy is hostile to certain specified union and employer conduct relating to union-security clauses. In particular, Congress has with unmistakable and express clarity proclaimed it unlawful for a union to engage in the very conduct of which Petitioners stand accused by Respondent in this case.

For his assertion that the conduct of procuring an employee's discharge under a union-security clause which is valid under the

tains nothing on the issue which is actually in the case which merits any discussion in addition to that contained in our principal Brief, except the novel contention that § 14(b) of the Act, 29 U.S.C. § 164(b), somehow implies some special immunity from pre-emption for States like Idaho which have enacted no legislation falling within its terms.

This contention cannot survive the fact that Congress squarely confronted the issue of pre-emption in this particular field—union activity involving the employment relationship pursuant to a union-security

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Act may not be protected, Respondent indulges himself in the following statutory analysis: "Section 7 refers to protected activities of 'employees'—individuals. The Union cannot claim that its conduct here falls under the mantle of protected activity of employees under Section 7. Not only is the Union not an 'employee' but its conduct in the instant case does not constitute one of the activities protected" (Resp. Br. 11). This is simply fatuous. The activities which are protected are of course activities related to unions. The very purpose of the Act was to protect the right of individuals to engage in union activity. Section 7 thus reads, "Employees shall have the right to self-organization, to form, join, or assist labor organizations • • • and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section [8(a)(3)] of this title." Manifestly, one of the "activities" that employees have the "right" to engage in—protected by Section 7—is to assist labor organizations and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection by a union which has augmented its strength by virtue of a union security agreement. This Court has recognized that enforcing valid union security agreements to eliminate "free riders" was one of the purposes of these particular provisions of the Act and that this Union conduct is protected by Section 7. See, e.g., *Radio Officers* v. *Labor Board*, 347 U.S. 17 (1954).

clause. "Congress undertook pervasive regulation of union-security agreements * * *." *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 100 (1963); see also *Radio Officers* v. *Labor Board,* 347 U.S. 17, 40-42 (1954), quoted at Pet. Br. 32; *cf. Labor Board* v. *General Motors,* 373 U.S. 734, 740-743 (1963). That Congressional regulation embraced the issue of pre-emption. In § 14(b) Congress set the metes and bounds of permissible State intervention: States may legislatively invalidate or impair the effectiveness of union-security provisions. But in the absence of such State legislation, the Federal law is to prevail. Accordingly, while a State Court may have jurisdiction concurrent with the National Labor Relations Board to interpret and enforce a State statute with respect to union-security agreements, *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96 (1963), cited at Resp. Br. 14, it has no such jurisdiction where there is no such State statute. In that event the Act prevails and renders Union conduct pursuant to union-security clauses either protected or prohibited. To this extent we might agree with Lockridge that by virtue of § 14(b) "the regulatory control of union security clauses has thus been divided between state and federal jurisdiction" (Resp. Br. 14).

In Idaho Federal jurisdiction prevails. Idaho has no legislation countenanced by § 14(b). Consequently, the emphasis by Respondent on § 14(b) demonstrates precisely the opposite of what it was submitted to demonstrate. That Section has nothing to do with the case. This Union conduct is not subject to any State legislation but is governed by the Federal Act and thus stands pre-empted.

II.

THERE ARE NO OTHER ISSUES IN THIS CASE

In transparent recognition that this Court must hold against him on the question actually presented in this case, Lockridge embarks on an audacious attempt to transform his claim by allusions to breach of the collective bargaining contract and breach of the duty of fair representation (Resp. Br. 1-2, 7-8, 21-28).[2] But this bold ploy cannot succeed. There are no such issues in the case—not least because Lockridge deliberately excluded them. Moreover it would be most unjust for this Court to accord them any consideration, Petitioners having been seriously prejudiced. But should the Court consider these issues, Petitioners should be sustained on the applicable Federal law.

1. Although the case concerns only a judgment against Petitioner Unions, Lockridge does not assert that they breached the collective bargaining contract. Rather, his present assertion is that Greyhound breached it by discharging him without sufficient cause.[3] His theory is that the breach by Greyhound

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[2] There is a parallel between this case and *Day* even on this score. In *Day* also, issues relating to § 301 were sought to be introduced in this Court. See *Day* v. *Northwest Division 1055, etc., et al.*, No. 301, O.T. 1964, Petition for Certiorari, pp. 10-14. In that case, moreover, there had been reference to § 301 in the dissenting opinion in the State Supreme Court. Nevertheless, this Court denied Day's petition for a writ of certiorari to the Oregon Supreme Court. 379 U.S. 878 (1964).

[3] The record on file with the Clerk of this Court contains the complete collective bargaining contract, Plaintiff's Exhibit 35. Sections 3(c) and 3(d) provide a grievance procedure culminating in binding arbitration "on all questions relating to the interpretation or application of the provisions of this agreement * * *." Obviously, any question of whether Lockridge's discharge was

is actionable against Petitioners as a breach of contract by them because they "motivated" the breach by Greyhound (Resp. Br. 7, 22). To state this theory is to brand it as a figment of Respondent's imagination. There is no such cause of action against a union under § 301 for motivating an employer's breach of contract. Lockridge cites no authority supporting his freshly minted theory; and there is none.

This is actually not any such new theory as Lockridge implies. To the contrary, it is the same old theory of tortious interference with employment under State law which is and has been the only claim involved in this case. The Union conduct which constituted the alleged motivation, however described, is the selfsame conduct which, for the reasons set out in our original Brief and not genuinely controverted by Respondent, is subject to the jurisdiction of the NLRB pre-empting any State Court jurisdiction.

2. Lockridge deliberately refrained from making any allegation of breach of the collective bargaining contract in the Second Amended Complaint upon which this case was tried. In particular, that Complaint

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"without sufficient cause" within the meaning of the contract would be subject to arbitration. Lockridge, who has insisted throughout that the collective bargaining contract has nothing to do with the case, see n. 4, *infra*, patently has no basis whatever for any assertions about a breach of contract, the merits of which would be determinable only in arbitration under the national labor policy. *Cf. Boys Markets* v. *Clerks Union*, 398 U.S. 235 (1970).

It is a gross misreading to assert that "Petitioners strongly contend throughout their brief that the union conduct in this case involved a violation of the collective bargaining agreement" (Resp. Br. 22). Conspicuously, there is no citation at that point. Our principal Brief contended that the Union conduct in this case involved the *employment relationship*. This Lockridge denied below and the State Courts accepted his position.

makes no reference to the "sufficient cause" provision upon which Lockridge now evidently seeks to rely (Resp. Br. 22; see n. 3, *supra*). This was manifestly deliberate, for the original Complaint did include such a claim. Originally, Lockridge joined the employer Greyhound as a party defendant and alleged that the termination of his employment was "without just cause and * * * not in conformance with the terms of the contract between defendant [Greyhound] * * * and the [Union]" (A. 10). Lockridge amended his subsequent Complaints to eliminate the employer as a party and to drop this Count.[4] His failure to allege any breach of contract claim against the employer, the only party against whom it is available under § 301, is dispositive that there is no such issue in the case.

3. Theoretically, a claim might be stated against a union under § 301 for breach of the duty of fair representation. The fact of this case, however, is there is no allegation in the Second Amended Complaint (or any prior Complaint for that matter) of breach of the duty of fair representation. Originally,

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[4] In his post-trial Brief in the Idaho District Court, Respondent expressly declared, "this case does not involve an action by a Union member against his employer and there is no claim that the employer acted wrongfully. Indeed, it has been held that where the employer has received notice from the union that a member has been suspended or expelled, under the contract with the union, the employer has no choice but to discharge the employee" (Plaintiff's Memorandum Following Trial, 21). In his District Court Reply Brief likewise, Lockridge asserted that "when the employer was notified by the union that plaintiff purportedly had terminated his union membership for failure to pay dues, his discharge from employment was automatic and it was not a burden of the employer to justify the Union action before effecting the discharge" (Plaintiff's Reply Memorandum, 6-7).

Lockridge had included a Count for punitive damages, albeit not on the ground of breach of the duty of fair representation; but even this he dropped in his Second Amended Complaint prior to trial (*cf.* A. 47 with A. 20). As Lockridge made no allegation of breach of the duty of fair representation, *a fortiori* he did not allege, and certainly did not prove, any such willful or deliberate arbitrary discrimination as is necessary for a claim of such breach. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey* v. *Moore,* 375 U.S. 335, 348 (1964); *cf. Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-339 (1953). What must be proved is "arbitrary or bad-faith conduct on the part of the Union * * *." *Vaca* v. *Sipes, supra,* at 193.

4. The most that was alleged and proved here is an honest error as to the interpretation of the legal language involved. As the Idaho District Court viewed the facts of this record, the Union "did believe it was technically on sound legal ground in requesting his termination" (A. 53). The Union conduct here was, that Court found, "predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted the same * * *" (A. 66). Likewise, the Court below drew a distinction between "discrimination" and "an honest misunderstanding of the contract," holding that only the latter was involved in this case (A. 106).

In short, the record shows that Lockridge neither alleged nor proved the additional issues which he would nevertheless like this Court to consider as in

the case. But having deliberately taken these issues out of the case as the master of his Complaint and of the evidence which he adduced, Lockridge cannot with any justice now be heard to say that they are sufficiently in the case to sustain the judgment below which quite obviously rests upon the fixed conviction that all such issues are alien in this case and that the only issue herein is the question Petitioners have argued regarding the pre-emption of State law.

5. Lockridge's temerity in now seeking to inject issues he deliberated excised from the case is all the more striking since there is no mystery as to why he restricted his case in this way. He based his claim narrowly and exclusively upon State law—with no Federal issues—to insure that the case would remain in the Idaho Courts and not be subject to removal to, and consideration and decision in, a Federal Court. It is familiar learning that the claim stated in the complaint determines whether a case may be removed.[5]

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[5] "• • • [Q]uestions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25, the complaints in the [State] court determine the nature of the suits before it." *Pan Am. Corp.* v. *Superior Court*, 366 U.S. 656, 662 (1961); *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 672 (1950); and cases cited therein.

As a fundamental matter of Due Process, moreover, the Complaint must provide fair notice to every defendant of the claims which he must meet. Obviously, the entire course of a defendant's preparation for trial and presentation of evidence therein is determined in significant measure by the claims stated in the Complaint. Had Lockridge stated any claims under § 301, Petitioners

Had Lockridge stated any claim under § 301 or cognizable under Federal law the case would have been removed. *Boys Markets* v. *Clerks Union,* 398 U.S. 235, 245 (1970); *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557 (1968).

The high significance of the forum, of the identity and nature of the fact finders, can scarcely be overstated. When there is a Federal question, "the litigant is entitled in the federal courts" to "the initial District Court determination" and not only to review in this Court. *England* v. *Medical Examiners,* 375 U.S. 411, 416 (1964). "This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." *Ibid.* Removal serves the purposes of protecting federal rights and providing a forum for the accurate and expert interpretation and application of Federal law. *Boys Markets* v. *Clerks Union, supra,* at 246-247.

Clearly, this applies to the right of appeal also. Had Lockridge not blocked entry into the Federal system, appellate consideration and decision would have been rendered by the Ninth Circuit—a Court familiar with union-security clause issues under the

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would have introduced additional evidence with respect to the understanding and practice of the parties; and as to the good faith and validity of their interpretation of the provisions involved. While we believe that the record even as it stands supports us and not Lockridge, should the Court reach the merits, this does not serve to diminish the fundamental prejudice wreaked upon Petitioners during the trial of this case.

Act.[6] It would appear that such issues were ones of first impression in this case to the Court below.

6. Apart from the forums which would have been available, Respondent has deprived Petitioners of trial and decision of any such issues under *Federal* law. Beyond doubt, § 301 issues are to be determined by Federal law. *Avco Corp.* v. *Aero Lodge 735, supra,* at 560; and cases cited therein. In fact, however, this case has been considered exclusively in terms of the law of Idaho. Had Federal law been applied, the ultimate substantive ruling would clearly have been otherwise. The judgment below rests on a technicality (Pet. Br. 11, n. 6) which the Federal labor law would have held specious and unrealistic, as the NLRB evidently did in *Day* (Pet. Br. 56-58). Moreover, even should Petitioners' interpretation and application of their dues provisions now be deemed erroneous, the Federal law restricts union liability under § 301 to union actions in bad faith. According to the facts of this record, however, Petitioners acted in good faith believing that their interpretation and application of the provisions involved were correct and valid. In the light of Federal law, therefore, Petitioners cannot be held liable. If there is to be decision here on the merits under Federal standards, the judgment below thus cannot survive.

Lockridge has evidently recognized this all along. He has acted throughout on the conviction that his only possible chance to obtain the money recovery which was his solitary objective was in the Courts of his home State and by appealing to State law; and hoping

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[6] See, e.g., *N.L.R.B.* v. *Pacific Transport Lines, Inc.*, 290 F.2d 14 (9th Cir. 1961); *N.L.R.B.* v. *Technicolor Motion Pic. Corp.*, 248 F.2d 348 (9th Cir. 1957).

upon hope that this Court would either deny review or somehow foresake its well-established preemption doctrines and decisions. For the overriding reality of Respondent's case is that the exercise of State Court jurisdiction which he invoked cannot be sustained compatibly with the decisions of this Court, the Congressional prescriptions in the Act or the imperatives of the Supremacy Clause.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioners, the judgment below should be reversed and the cause remanded with direction to dismiss this action.

Respectfully submitted,

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